

July 23, 1739.

Unto the Right Honourable, The Lords of Council and Session,

T H E
P E T I T I O N
O F

51.

Thomas Makdougall *Heir-male* of Ma-
kerstoun,

Humbly sheweth,

THAT the Estate of *Makerstoun* having been in-
cumbred, and the Rights upon it acquired for
the Behoof of *Henry Makdougall* the Heir of
the Family, and centred in the Person of Sir
William Scot of *Harden*, he, in anno 1668, made over the
same to the said *Henry Makdougall* in Liferent, and to *Tho-*
mas Makdougall his only lawful Son, and his nearest Heirs-
male, which failing his nearest and lawful Heirs and Assi-
gnies whatsoever.

But as the Estate really belonged to the Father, though the
Conveyance was in the Form of a Fee to the Son, there is
reserved to him a Power over the whole, to dispose of the
same at his Pleasure, during his Lifetime, in the same man-
ner as if the full Fee had been vested in him, and had not
been given to the said *Thomas Makdougall* his Son: So that
if he was not by Name a Fiar, yet thereby was constituted

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to him an *ususfructus causalis*, with all the Powers belonging to a Fiar.

In the same Year a Charter under the great Seal was procured in the Terms of this Disposition, wherein the Powers of the Father are *verbatim* ingrossed, as they were also in a subsequent Charter taken out, *anno* 1669, wherein the Holding was changed from simple Ward to Taxt-ward.

Henry Makdougall, vested with these Powers, in *March* 1684, made an Entail of the Estate, reserving his own Life-rent, giving the Fee to *Thomas* his Son, and the Heirs-male of his Body; which failing, to the said *Henry* himself, and the Heirs-male of his Body, with several Substitutions over, and Limitations upon the Heir of Entail, not to contract Debts, nor alter the Succession: And the Deed contains reserved Powers to *Henry* to alter, and a Dispensation with the not delivery; and the said *Henry* lived till the Year 1692, when he was succeeded by *Thomas* his Son, who had Right to the Estate, both by the Charters above-mentioned, and by the Entail made by his Father, in consequence of the reserved Powers; but it does not appear that either he, or his Son *Henry*, who succeeded to him *anno* 1701, expedite any Charter upon this Entail.

When *Thomas* died, *anno* 1701, he left three Sons, namely, the said *Henry*, your Petitioner, and *William*, all of them of tender Years, the eldest not being of Age till the Year 1711.

Henry, *anno* 1715, made a Disposition of his Estate in favours of himself, and the Heirs-male of his own Body; which failing, to *Barbara Makdougall*, then his only Daughter, and the Heirs-male of her Body, with other Remainders over; and this Disposition was not compleated until the Year 1723, that the said *Barbara* his Daughter was served Heir of Provision in general to her Father, whereby being vested in the Right of the Procuratory, she resigned the Lands, and was publickly infeft therein.

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It is not material here to trouble your Lordships with any History, how the Entail whereby the said *Henry Makdougall* was disabled gratuitously to alter the Succession, was during this Period dormant, and not seen; the Thing speaks itself, that it was rather surprising that ever it saw the Light after the Death of the Father, than that at length it was brought out, and became the Subject of a Process now depending before your Lordships.

The said *Barbara Makdougall* in February 1733, who, as Heir of Provision in general served to her Father, disabled by the foresaid Entail to alter the Succession, intermarried with *George Hay*, second Son of Sir *John Hay* of *Alderston*, and in this Contract Mr. *Hay* was obliged to apply *L. 15000 Sterling* towards Payment of the Debts of the Family; and on the other Side, the Estate was to be provided to the Husband and Wife in Liferent, for his Liferent use allenary, and to the Heirs-male of her Body, which failing, to the Heirs to whom the Estate was limited in the Father's Deed.

Your Petitioner coming very late to the Knowledge of this Deed, was at last however served Heir-male and of Tailzie and Provision to his Father, by virtue of the Settlement 1684, and brought his Action of Reduction of the Settlement made by *Henry* his Brother in the Year 1715; and the Contract of Marriage between the said *Barbara Makdougall* and Mr. *Hay*, which depended upon it; and upon the other Hand, the Defenders in that Process having brought a Reduction of the Tailzie 1684, the Production being satisfied, the Reasons of Reduction *hinc inde* having been heard, and Informations, by Order of the Lord *Arniston* Ordinary, having been given in, the following Interlocutor upon the 12th current, was upon his Lordship's Report pronounced, " The
 " Lords find, That the Writer of the Bond of Tailzie made
 " by *Henry Makdougall*, anno 1684, produced as the Title
 " of *Thomas Makdougall* in this Process, and the Witnesses
 " thereto, are sufficiently designed, and therefore repels the
 " Ob-

“ Objection founded on the Act of Parliament 1681 Years ;
 “ and find that the Faculty contained in the Disposition
 “ 1668, granted by Sir *William Scot of Harden* to *Henry*
 “ *Makdougall* of *Makerston* in Liferent, and to *Thomas*
 “ *Makdougall* his Son in Fee, and to the Heirs-male in fa-
 “ vours of the said *Henry Makdougall*, did enable him to
 “ dispose of the Estate, not only for onerous Causes, but gra-
 “ tuitously ; and did also enable him to alter the Succession
 “ contained in that Disposition in *anno* 1668, and therefore
 “ repel the Objection, that *Henry Makdougall* had no
 “ Power to make the Tailzie in *anno* 1684.

“ But find, That the Bond of Tailzie 1684, having lyen
 “ latent, and not having been claimed upon, or any Docu-
 “ ment taken upon it for upwards of Forty Years from the
 “ Date thereof; and the Estate having been possessed by *Tho-*
 “ *mas* and *Henry Makdougalls*, and *Barbara Makdougall*,
 “ present Possessor thereof for upwards of Forty Years, in
 “ virtue of the Disposition in *anno* 1668, and the Infest-
 “ ments following thereon, they have the Benefit both of a
 “ negative and positive Prescription; and that the Tailzie in
 “ *anno* 1684, cannot now be set up as a Title of Eviction of
 “ the Estate from the said *Barbara Makdougall*, notwith-
 “ standing that *Henry* and *Thomas Makdougalls*, her Father
 “ and Grandfather, were Heirs by the Tailzie 1684 Years,
 “ as well as by the Disposition and Infestment 1668 : *And*
 “ *find*, That the Minority of *Thomas Makdougall*, or of
 “ *William Makdougall*, could not interrupt the Prescripti-
 “ on, they being only Substitutes by the Tailzie 1684. And
 “ the Right thereof not having devolv'd upon them during
 “ their Minority. *And find*, That *Thomas Makdougall*, Pur-
 “ suer in this Process cannot found on the Minority of *Hen-*
 “ *ry Makdougall* his Brother, in order to prevent the run-
 “ ning of the Prescription in Favours of *Henry Makdougall*
 “ himself, and *Barbara Makdougall* who derives Right from
 “ him. *And find*, That *George Hay* having entered into
 “ Marriage

“ Marriage Contract with *Barbara Makdougall*, who stood
 “ seized in the Lands by virtue of a Progress of Infeftments,
 “ containing no Limitation upon her Father, and having be-
 “ come bound to advance *L. 1500 Sterling* towards Pay-
 “ ment and Exoneration of the Debts of the Family, in Con-
 “ templation, and upon the mutual Agreement of the Estate’s
 “ being settled upon him in Liferent, and the Heirs-male of
 “ the Marriage; the Contract was fully onerous, and there-
 “ fore must be available, and subsist according to the Con-
 “ ception thereof in Favour of the said *George Hay*, and the
 “ Heirs-male of the Marriage, notwithstanding of the latent
 “ Tailzie 1684 Years, the same having never been record-
 “ ed, nor any Infeftment or Document whatsoever taken
 “ thereupon, and therefore decerned and declared in the Re-
 “ duction and Declarator, at the Instance of the said *Barba-
 “ ra Makdougall*, and *George Hay* her Husband, and assoilzied
 “ them from the Reduction at the Instance of the said *Tho-
 “ mas Makdougall*.”

By the first Part of this Interlocutor, your Lordships re-
 pel an Objection against the Tailzie 1684, which is your Pe-
 titioner’s Title. And further, your Lordships find, that *Hen-
 ry Makdougall* was impowered by the Right vested in him,
 to make the foresaid Tailzie, and effectually to limit the
 same; so that *in anno 1684*, after the Tailzie was made, nei-
 ther *Thomas Makdougall*, nor any other Person claiming un-
 der his Right, could pretend gratuitously to alien the Estate,
 or alter the Succession as therein established: And so far your
 Lordships seemed to be unanimous.

But as to the remaining Part of the Interlocutor, your
 Lordships were very much divided in your Opinions, in so
 much that the Judgment therein contained was carried by a
 casting Vote, and one of your Lordships gave no Opinion;
 therefore the Case being of so great Importance to your Peti-
 tioner, he hopes your Lordships will forgive him, for pray-
 ing a Review as to the latter Parts of the Interlocutor, where-

by some former Opinions and Decisions, that were thought to be received into the Law of *Scotland*, seem to be varied; and your Petitioner apprehends, a Foundation laid for a very considerable Alteration of Property in this Kingdom.

The first Question that is determined is this, How far, when two Titles to an Estate concur in an Heir in Possession, Prescription negative or positive can run against one of these Titles, during the Time when the Title against which the Prescription is pleaded, as well as that which is said to be strengthened by the Prescription, are in the same Person? And your Lordships have found that the Prescription can run.

The second Question is, Whether, supposing Prescription to run, the same can be interrupted by the Minority either of the Heir in Possession, or of the Substitutes in the Entail? and your Lordships have found, that it can be interrupted by the Minority of neither; so that now we have in our Law a Prescription that runs against no Body, and that can be interrupted by no possible Minority; or if it runs against any Party, yet the Party's Minority does not interrupt it; and yet these Things, with Submission, appear, at least at first View, repugnant to the common Notions that have been received concerning this Matter.

The *third* Question is, Whether a Person standing in feist, and entring into a Contract of Marriage, all the Covenants by the Contract upon the Person sealed in the Lands, not only in favours of the Husband, but of the Heirs of the Marriage, are effectual against a third Party, who can, and does afterwards reduce the Right of the Party contracting, as proceeding *a non habente*? and whether, *resoluto jure dantis, resolvitur jus accipientis*? and your Lordships have here found, that tho' the Right of *Barbara Makdougall* were reducible, and reduced at the Instance of your Petitioner, yet not only the Husband shall take what is stipulated to him, but even the Issue, who are her Heirs of Provision, shall take the Estate, to the Prejudice of your Petitioner.

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These Questions I have stated, in order the more distinctly to lay before your Lordships, and in as few Words as possible, the Arguments that, with Submission, I apprehend are extremely strong to procure an Alteration.

And, with Regard to the first of these Questions, it is to be considered, first with Respect to the negative Prescription, and next as to the positive.

In the Law of *Scotland* Prescription neither negative nor positive were known, until they were introduced by Statute. The negative Prescription was introduced by the Acts of Parliament 1469, *cap.* 20. and Parl. 1474, *cap.* 75.

In the first of these Laws it is statuted, “ That the Party
“ to whom the Obligation is made, that his Interest therein
“ shall follow the said Obligation within the Space of forty
“ Years, and take Document thereupon; and if he does not,
“ it shall be prescribed, and be of nane avail, the said forty
“ Years being run, and unpursued by the Party.”

Here your Lordships see, that from the very first Step made towards Prescription, it plainly was introduced in favours of one, and to the Prejudice of another Party. It supposes an Advantage to arise to those who are to be benefited by the Prescription, and an Omission on the Part of the other to be punished by the intire Loss of the Right arising to him from the Obligation. How is it possible therefore that this can apply, when one Person is both Debitor and Creditor in the Obligation directed to be pursued for within the 40 Years? Is it to be conceived, that the Law was introducing a Remedy, whereby the same Party was to set up one of his own Rights against another, that if he should not pursue himself, a Benefit was to arise to himself? The Words of the Law are repugnant to such an Interpretation; and the Reason of the Thing would be so odd, and so anomolous, that one can hardly so much as have a *Quasi*-conception of it. It could have no other Consequence, than that Parties principally interested might have an Opportunity of stealing from their own Heirs,

or from other Persons having a consequential Interest in the Right.

It is upon this Consideration, that when any Person is in Possession of Lands, and has many Titles in his Person, none of those Titles do prescribe, though the Possession is ascribable only to that Title to which it did begin in prejudice of him from whence the Possession was acquired; but as to all others from whom the Possession flowed not, the same may be defended upon all Rights in the Possessor. The negative Prescription runs against none of them, because he himself is the Party against whom the Action could be brought, and for that Reason Action upon that Title does not prescribe. The Laws with Regard to Prescription, both negative and positive, clearly considering this Remedy of Prescription, as running between two Parties, the one having Interest that the Right should be preserved, and the other that it should not be preserved, and where it is not so, there are no *termini habiles* in a Prescription.

Thus in the Act of Parliament 1617, it is declared, That in the Course of forty Years Prescription, only the Years during which the Parties against whom the Prescription is used and objected were Majors, are to be counted, plainly stating the Prescription as running in favours of one, and against another; but that the Right Leg should prescribe against the Left, or one Pocket of a Coat against another, and the Doctrine and Consequences of such a Prescription is of so new a Date, never broached till the known Case of the Earl of *Dundonald* against the Marquis of *Clydesdale*, and there rejected, that it clearly shows it is no native Consequence from the Rules of Prescription, but the Offspring of Ingenuity: And if it is not splitting of a Hair, it is at least splitting of a Person, and making him fight against himself.

In the Case above mentioned, where many Titles concur in the Person of one Possessor, it is a known and received Maxim, that to the End of the World during his Possession, he

he may defend himself upon any one of these Titles; and any Adversary of his in a Process cannot found upon the negative Prescription as extinguishing the Right.

Thomas Makdougall if he had lived an hundred Years, and possessed the Estate in question, and in the End of his Days, it had been necessary for him to found upon it, would it have been prescribed against himself? Your Petitioner apprehends it would not; and if it was not prescribed as against himself, how can it be prescribed as against others, that thereby were to take only after, and upon Failure of him? as if he could keep it alive and make it dead when he pleased, according as his several Purposes required it; which is liker Conjuring than any thing else, having it in his Power to shew it dead or alive, according to the Person to whom he produced it.

It is upon the Consideration that Prescription runs as between two several Parties, that the Exception of *non valens agere* is received into the Law; for if merely the Length of Time, without Consideration of the Parties, did extinguish a Right, to what Purpose introduce the Exception of Minority, the Maxim, that *contra non valentem agere non currit prescriptio*? which all apply themselves to Persons, and not to the Deed, concerning the Validity whereof the Question is put.

Prescription runs, not from the Date of a Bond, but from the Term of Payment, because there was no *actio nata*, but from that last Period. The Deed did not become ineffectual as if the Ink and Subscription did fly off, when it remained forty Years upon the Paper, but when he who had the Right or Action did not, after it was in his Power, use that Right within the Space of forty Years. This necessarily requires two Parties having Interest, as essential to the Application of the Law.

If the Foundation of Prescription is considered, it speaks the same Language, if it is put upon this, that the Person who

might claim holds it *pro derelicto*, and so in effect consents that it may be the Property of any other Person that takes it up, it necessarily supposes several and distinct Persons; for that a Man should throw away the Property, that he may take it up again, and that the Law should enable him so to do, does not easily enter into one's Conception.

In the present Case, *Thomas Makdougall* could not, by any Act of his, defeat the Entail, founded upon a Quality in his own Right, which was his Title; nor can his Negligence be a Foundation, or his presumed Dereliction, to destroy that Deed, which he could not defeat.

The positive Prescription, as to this Argument, may come under another Consideration, and shall afterwards be examined; but as to the negative Prescription, your Petitioner, with humble Submission, cannot but think his Arguments are conclusive.

If it shall be said, that though both Titles gave Property to *Thomas Makdougall*, yet the one Right was *sub modo*, the other was more beneficial; so that the Length of Time wrought off the Deed, with the *modus* or Restriction, and that whereby he was unlimited Fiar remained in full Force.

In the first Place, until *Thomas* entred into a Possession upon the Death of his Father, what Title he was to use, did not appear, and therefore, during the Life of the Father, who might have at any Time renewed this Deed, this negative Prescription could never begin to run; and yet if your Petitioner understands your Lordships Interlocutor aright, your Lordships have found that the Deed was prescribed after forty Years from its Date.

Next, supposing the Interlocutor to put it as if the negative and positive Prescription did run from the same Period, namely, *Thomas's* Possession from the 1692, yet by both Deeds he was Proprietor, upon neither could any Person possess but himself, how then could that Possession which was applicable to either, and must have been the Consequence

quence in whatever Way the Title was made up, destroy this Quality or *modus* not inconsistent with that Possession? And for that Reason your Lordships have indeed found that it prescribes from the Date of the Entail; and your Petitioner cannot understand otherwise, than that it prescribes for, and against himself: And this is submitted to your Lordships Consideration.

If again it be said, That it cuts down the Right as against the Substitutes, and they are the Parties as against whom the Prescription runs, then your Lordships will consider, that their Right could only take Place upon the Failure of the Institute and his Heirs; it was conditional, and your Petitioner believes it is a Rule, that in conditional Rights Prescription can only run from the Existence of the Condition.

Upon this, if it is replied, That the Substitutes have an Interest, such as intitles them to raise a Declarator, or such like Process; and therefore, even before the Existence of the Condition, the Right may prescribe against him, cannot the same thing be said with regard to a Bond, where there is a distant Term of Payment, that the Prescription must run from its Date, in regard the Party, who in the End is to have an Action for Payment, may as effectually bring an Action of Declarator, that at such a Term the Money will be due, as the Substitutes can declare their Right of Succession?

The Term, from which Law considers the Prescription to run, is not when an Action may be raised about, or concerning the Obligation or its Subject, but when any Right arises to the Party to claim Benefit or Advantage from the Deed; if after that he lingers, he is punishable and punished; but till then the Law was not so fond of Processes, as to draw Parties in to them, or punish them for not being litigious in going to Law, when, by the Event of the Process, they were not to reap any immediate Benefit. Till that Time there was no Negligence

gence, and the injoining or bringing on a Necessity of Processes, was really against the Subjects, and only in favours of the Officers and Practisers in the Court.

But then, if the Substitutes are considered as the Persons against whom, and the Institute, the Person in whose Favours the Prescription takes Place, then your Lordships will consider how 'tis possible to avoid their Minority being an Interruption, which is to be considered under the second Question.

With regard to the positive Prescription, what is above said seems to be no less evident: It was introduced by the Act of Parliament 1617, and before that Period not admitted into our Law.

By that Act, the Benefit to be acquired by the Subjects, who, their Predecessors and Authors had bruiked the Lands by their heritable Infeftments for the Space of forty Years, is, that such Persons, their Heirs and Successors, should not be troubled nor unquieted in the heritable Right of such Lands: The heritable Right to Lands belongs to an Heir of Entail, served to his Predecessor, and in Possession, and it is extremely plain, that that Law was never intended to work off a *Modus* or Quality that, according to the Law, was put upon such Property: Nor was it believed that Possession would render the same ineffectual under the Colour of Prescription.

And for that Reason, where Reversions were granted of Property, the Legislature did not believe that the positive Prescription introduced would destroy such Reversions; and therefore in the Clause subjoined, Reversions are ordained to be registered, or incorporated in the Body of the Infeftments; and if they they are not, in that Event only are declared to be void and null, and fall under the Prescription.

And as is above taken Notice of, the Prescription is considered always as to run between two Parties, and for that Reason Minority is to be discounted, and the Clause is so conceiv-

conceived, as makes out the Proposition your Petitioner contends for; for it is said, that in the Course of the said 40 Years Prescription, the Years of Minority and less Age shall nowise be counted, but only the Years during which the Parties, against whom the Prescription is used and objected, were Majors, and past 21 Years of Age; and this is subjoined both to the positive and negative Prescriptions that are established and confirmed in that Law. So that the Lawyers in those Days had no Notion, but that in the pleading of all Prescriptions there were two Persons, one in Favours of whom, and another against whom the Prescription was to run, and not that one Person could sustain *personam* of him for whom the Prescription was to operate, and against whom it was to run, which seems to be as inconceivable, as if a Man was to bring a Process against himself, and intirely beyond the Intention of the Law.

This Point was very fully argued and considered, in the Case of the Marquis of *Clydesdale* and the Earl of *Dundonald*; and there are indeed some Distinctions that may be made between that and this Case, but real Differences there are none. The Foundation of the Decision was this; That when two Rights are center'd in the same Person, there are not *termini habiles* of a Prescription against any one of them; and this your Petitioner hopes he has supported, and believes he is able to add a great Deal on this Subject, if he were not unwilling to repeat what was formerly laid before your Lordships, or perplex the Point with too long Arguments.

The 2d Question is, Whether, supposing Prescription to run in Favours of the Possessor, and primarily indeed against himself, or against the Substitutes; Whether his Minority, or the Minority of the immediate Substitutes in the Entail, will interrupt the Prescription? Your Lordships have found, that the Minority of neither is to be deduced.

Upon this Point, your Petitioner might refer to what, he hopes, he has with some Force of Argument set forth in the

former Part of this Petition ; especially to the Clause of the Act 1617 above pointed out, which seems to be express upon this Subject. It goes both to the negative and positive Prescription, and in the strongest Words, says, *That such Years only are to be counted as past during the Time, when the Parties, against whom the Prescription is used and objected, were Majors.* Now, with Submission, it will be a very strange Prescription, that neither runs against, nor is to be objected against any Person. Is it not objected at this Day against your Petitioner ? Is it not used against your Petitioner ? And must not his Minority therefore be deduced ? If the Words of the Statute are followed, your Petitioner is convinced, it is unnecessary to dwell longer upon it.

If here it is said, That upon the Death of *Henry Makdougall*, *Thomas* his Son had two Titles, that he could chuse upon which of them he was to enjoy the Estate ; that he had chosen the more beneficial Title for him, upon which Possession had been had for upwards of Forty Years ; so that, by the positive Prescription, that Title was confirmed : And as the Substitutes could have brought an Action, but did not, there was no Interruption.

To this your Petitioner answers, That *Thomas Makdougall* was not at Liberty to chuse which of the two Titles he was to possess by ; the Entail made by the Father was binding upon him, the Father's Powers being a Condition in his Infestment ; that is a Question, that upon a full Debate was determined in the Case of the Countess of *Sutherland's* Tailzie, between the Duke of *Douglas* and the Lord *Strathnaver* ; so that really your Petitioner apprehends, upon a fair Construction of the Matter, *Thomas's* Possession, after the Father's Death, was a Possession upon the Entail.

For, let it be supposed, that the Possession was upon the Infestment to *Thomas* ; if the Liferent had not been reserved in the Father's Lifetime, but that the Fiar had been to enter during that Period ; he could not possess contrary to his Title,
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he would have posselt for himself, and for the Father, in as far as he had Interest in the Subject, *namely*, Powers to make the *Entail*; in the same manner, as the Vassal possesses for a Superior, or the Tenant for a Master. In the Construction of Law, both Father and Son for their several Interests, would have been in Possession, as a Liferenter and a Fiar are; therefore when the Father died, having exercised the Power, the Possession was continued both for Support of the Power, and the Exercise of it; had *Thomas* the Son, possessed by virtue of an Infeftment, inconsistent with this Entail, your Petitioner could have had some more Notion, how the inconsistent Possession of the Son with the Entail might have affected it; but as I have shown your Lordships, that the Possession was so far from inconsistent, that if a third Party had had a Claim to the Lands, the Possession of *Thomas* would not only have completed the Prescription, with regard to himself, but even as to the Father's Powers, How is it, with Submission, possible to say, that a positive Prescription run against the Exercise of that Power?

Again, as the Negligence upon the Part of the Substitutes, is said to be, That they did not bring an Action against *Thomas* to possess upon the Entail, How is it possible, upon the Words of the Act of Parliament, not to deduce the Minority of those against whom this Prescription run?

If it is urged as an Absurdity, That the Minority should be deduced, because, at that Rate, if any one, even of the remote Substitutes, to whom this Action was competent, were Minors, the Prescription would not run, your Petitioner answers, that he can see no Absurdity at all, because this arises from the Circumstance already noticed, that both the Deeds were in Favour of the same Person, where if a Prescription can at all run, which, your Petitioner apprehends, it cannot, it must be deemed to run against the whole other Substitutes, and by Consequence the Minority of any one of them must interrupt the Prescription by the express Words of the Statute, where-

whereby the same is introduced. And upon the very same Foundation as your Lordships have always found, that where a Party could not raise an Action *cum effectu*, so as to attain Possession, he was not bound down by a Prescription for not raising an Action, that could not then let him in to the Possession, in regard he was *non valens agere cum effectu*.

Your Petitioner apprehends, there are several other Arguments that occur upon this Point; but he is unwilling to trouble your Lordships, in the End of a Session, with a Paper of an immoderate Length: And therefore shall proceed to the 3d Point in this Interlocutor, which is, Whether a Person standing infest upon a Title reduceable, as flowing *a non habente potestatem*, her Covenants entered into in a Contract of Marriage will be found effectual, both as to Husbands and Heirs of a Marriage, against the Person who is found to have the only Right to the Estate.

And here your Petitioner must observe, That as it is noticed in the Interlocutor, that Mrs. *Barbara* stood infest when she entred into the Contract of Marriage, it seems to have been in your Lordships Eye, that there was a *bona fides* upon the Part of those who contracted for the Husband and the Issue of the Marriage. But your Lordships, in order to bring the Question upon the Case, will observe, that the *bona fides* here, and the Faith of the Records, can give no Aid to my Parties, for her Infestment informed them, that *Henry Macdougall* had Power to settle the Succession; that *Thomas's* Right and her Right was subject to an Entail made by *Henry*; and therefore they entred into the Contract at their peril, knowingly that if an Entail did appear, the Right to her and her Issue was to be cut off; and therefore, without Regard to the favourable Argument from the Faith of the Records, the Case is to be judged of according to the Principles of Law.

Upon these it has constantly been held, that *resoluto jure dantis, resolvitur jus accipientis*, the Right of the Person
who

who contracts, depends upon the Right of his Author; *nemo plus juris tribuere potest, quam ipse habet*: And what is thus laid down, are plain Consequences from natural Justice, as well as from Law. If any Man stands infest in the Estate of another, and grants even an Infestment to a third Party, if the Root is cut up, the Tree and all its Branches fall with it. There are many Instances in the Law, wherein these Maxims may be exemplified; If an Estate is conveyed after an Inhibition, the Deeds granted by the Person whose Right is liable to the Inhibition, will not stand against the Inhibiter; but the Author's Right being cut down by a Reduction *ex capite Inhibitionis*, the Offspring of it falls to the Ground, just as when a Link in a Chain is opened, all that is under it comes down with it.

And it is of no Force here to say, that he who contracted with the Person inhibited, knew that his Right might possibly be cut off by the Inhibition, because here the Parties Contractors were certiorated by the Charter, under which they claim, that *Henry Makdougall* might have made an Entail, by which the gratuitous Right to Mrs. *Barbara* was defeasable.

And as to what is said, That the Contract was onerous, because of the *L. 1500* to be applied by Mr. *Hay* towards the discharge of the Debts of the Family, if such a Sum was really applied, then there may be an Action for Recovery of the same against the Heir who is benefited by it, but it is no good Reason why the Estate of a third Party should be further incumbered or taken away.

In the *second* place, as to the Heirs of the Marriage, your Petitioner always understood, and he is persuaded your Lordships will be opinion, that they must succeed as Heirs of Provision to their Mother, who is served Heir of Provision to her Father, and was under Obligation from the Tailzie founded on, not to aliene the Estate gratuitously: So that if *Henry* would have been liable, the Daughter as representing

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him

him must be so, and the Heirs of the Marriage as representing her.

Though Provisions in Contracts of Marriage are onerous as to the Parties Contracters, so that neither of them can gratuitously defeat the Succession of the Issue of the Marriage; yet the Estate is not so far bound up, but that truly onerous Creditors will affect the same, and the Children as Heirs of Provision will be liable: And if they cannot defeat the onerous Deed of the Party Contracter, how is it possible that the Covenant in the Contract can defeat a Right paramount to the Right of the Party contracting? a Right that is secured by the very Infeftment under which the Heirs could claim; a Right that was no more than a Succession to that which was in the Party-contracter, in no ways different from a common Succession, but that the Party who entered into the Contract could not gratuitously defeat it.

The Doctrine that seems to be laid down by this Part of the Interlocutor, your Petitioner is verily persuaded, would much affect Property, and weaken it.

In the Beginning, as *Dirleton* observes, Destinations in Contracts of Marriage were thought no further binding than to oblige the Party once to resign, substituting the Heirs of the Marriage; but the Father had still a Power to alter. By Custom the Issue is now construed to be partly Heirs, and partly Creditors, so far Heirs, that the Party Contracter cannot gratuitously disappoint them, and thereby the Property of the Father was in some Measure affected and diminished; but in other Effects they were construed as common Heirs. If the Interlocutor reclaimed against stand, then the Law is to advance a Stride higher, and the Contract, which only limits the Fee of the Father, to prevent gratuitous Alienations, but not his onerous Deeds, is to cut off the Property of third Parties; so that though the Issue are Heirs to the Party Contracter, yet they are to take the Estate from the Ancestor, though that Estate was not the Ancestor's own, but the

the Estate of third Parties, as to whom the Contract cannot be said to be in the faintest Degree onerous, or with them a Contract or Covenant at all; therefore whatever may be said with Regard to the Interest of the Husband, which your Petitioner however thinks must fall also, yet, as to the Interest of the Heirs of the Marriage, your Petitioner is perswaded your Lordships, upon a Review, must alter your Interlocutor.

Thus far your Petitioner has, as far as the Hurry in the End of a Session would allow, examined into the Questions determined by this Interlocutor, which he confesses are not of easy Discussion, and deserve to be maturely and thoroughly weighed and considered; and if he has not been able properly and fully to lay all his Arguments before your Lordships in this Paper, he hopes your Lordships will not cut him off from an Opportunity of being heard by his Council, who are better acquainted, and have more considered the Case, than the Drawer of this Petition, because of his Absence when this Matter was prepared for the Report.

May it therefore please your Lordships, in consideration of what is above represented, to review so much of your Interlocutor as is complained of, and to find, imo, That no Prescription could begin to run, either negative or positive, until the Death of Henry Makdougall the Father, in anno 1692. 2do, To find, That Thomas Makdougall having possess by virtue of an Infestment, containing Powers to Henry his Father to make an Entail, that his Possession upon it could never destroy the Entail, which was the Exercise of the Powers that were a Condition in his own Infestment; and that his Negligence in not resigning, as he was bound upon the Entail, cannot hurt or prejudice the Tailzie 1684, nor the Omission of the Substitutes, who, by no Action, could, cum effectu, enter upon the Estate, until the Succession opened to them; and that no Prescription

ption, positive or negative, could run, while both the Right of the Infestment and of the Tailzie centred in him. 3tio, To find, That if any Prescription could possibly run by the positive Prescription, the Minority of the Parties, against whom the Prescription is to be objected, must be deduced, and so both the Minorities of Henry, Thomas, and William Makdougalls, Sons to Thomas Makdougall, who died in the Year 1701, must be deduced, whereby the 40 Years is not elapsed. And 4to, To find, That the gratuitous Disposition by Henry Makdougall in favours of his Daughter, is reducible at the Instance of your Petitioner, and being reduced, the Covenant entred into by her cannot affect the Estate. And to find, That the said Barbara Makdougall, as Heir served to her Father, being bound to convey the Estate to your Petitioner and other Heirs of Entail, in the Terms of the Tailzie 1684, that this Obligation is not defeated by the Contract of Marriage. And lastly, To find, That the Issue of the Marriage, who are to succeed as Heirs of Provision to their Mother, can be in no better Case than she herself and that with her Right their's must fall to the Ground. And in case of Difficulty, to allow your Petitioner to be heard by his Council in your Lordships Presence.

According to Justice, &c.

CH. ARESKINE.

